Word Music, LLC et al v. Priddis Music, Inc. et al Doc. 53

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

WORD MUSIC, LLC, et al.,	)	
	)	
Plaintiffs,	)	**CASE NO. 3:07-cv-0502**
	)	**JUDGE HAYNES**
v.	)	**JURY DEMAND**
	)	
PRIDDIS MUSIC, INC., et al.	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Come now Defendants Priddis Music, Inc., Richard L. Priddis and Prosound Karaoke, Ltd. (hereinafter the "Priddis Defendants"), by and through undersigned counsel, and hereby submit this Memorandum of Law in Opposition to the Plaintiffs' Motion for Preliminary Injunction.

I. ARGUMENT

A. The Motion Should Be Denied Based on the Priddis Defendants' Motion to Dismiss.

On or about June 1, 2007, the Priddis Defendants filed a Motion to Dismiss this action, based on lack of personal jurisdiction and improper venue. Therefore, the Priddis Defendants continue to rely on the arguments contained in their Motion to Dismiss (and their Reply relating thereto), and assert that the Plaintiffs' Motion for Preliminary Injunction should be denied. Nothing stated herein shall be construed as a waiver of the objections set forth in detail by the Priddis Defendants in their Motion to Dismiss.

In addition, on or about July 9, 2007, at the initial case management conference, the Court declined to schedule deadlines in this case, pending its decision on the Priddis

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Defendants' Motion to Dismiss. According to the Clerk's Resume of Proceedings, the Court did not provide counsel with a timeline as to when it would rule on the Motion to Dismiss.

B. The Priddis Defendants Have Obtained Licenses.

According to the Sixth Circuit, the existence of a license creates an affirmative defense to a claim of copyright infringement. AGT International, Inc. v. Level 3 Communications, LLC, 2002 U.S. Dist. LEXIS 21536, *10 (copy attached). The Plaintiffs move this Court for the entry of a preliminary injunction enjoining the Defendants from manufacturing, releasing, distributing, advertising, selling or otherwise exploiting, without first obtaining a corresponding license, any products utilizing the music copyrights the Plaintiffs allege they own in certain compositions which they identify as the "subject works." See Exhibit A to Complaint.

Specifically, the Plaintiffs have identified 345 songs as the subject works, and assert in their Motion that the Plaintiffs "have never authorized the Defendants to exploit these copyrighted musical compositions." The Priddis Defendants, however, have purchased hundreds of mechanical and reprint licenses relating to the subject works. Declaration of Richard L. Priddis at 3 and Exhibit A to Declaration. To the best of their knowledge, information and belief, the Priddis Defendants have at all times relevant to the Complaint complied with their obligations concerning licensing as they relate to the subject works. Declaration of Richard L. Priddis at 3. The Priddis Defendants have attached as Exhibit A to the Declaration of Richard L. Priddis a true and correct list of license numbers relating to the subject works. Declaration of Richard L. Priddis at 3. After examining exhaustively the Plaintiffs' list of subject works, and after crossreferencing to the best of their ability the subject works with the Priddis Defendants' records kept in the ordinary course of business, the Priddis Defendants compiled Exhibit A to the Declaration of Richard L. Priddis.

Exhibit A to the Declaration of Richard L. Priddis provides mechanical license numbers corresponding to the subject works and, in most cases, reprint license numbers (and/or dates of such licenses), as well. Declaration of Richard L. Priddis at 4 and Exhibit A to Declaration. Where no reprint license number/date is listed, the related product did not include printed lyrics for that particular song. Declaration of Richard L. Priddis at 4 and Exhibit A to Declaration. In situations involving withdrawal or revocation of reprint licenses, it has been the Priddis Defendants' business practice to discontinue the use of lyrics in conjunction with that song or to discontinue the corresponding product. Declaration of Richard L. Priddis at 4. Also, the Priddis Defendants have made payment arrangements to obtain a compulsory license for "I Walk the Line." Declaration of Richard L. Priddis at 4.

More specifically, the Plaintiffs' subject works include eight songs which are not part of the Priddis Defendants' product catalogue and, therefore, the Priddis Defendants are uncertain as to why the Plaintiffs included them. Declaration of Richard L. Priddis at 5 and Exhibit A to Declaration and Exhibit A to Complaint. Accordingly, the Priddis Defendants have made the following notation on Exhibit A next to those particular songs: "(not one of our songs)." Declaration of Richard L. Priddis at 5 and Exhibit A to Declaration. Concerning the song "Lucky Star," a license was at one time available to and applied for by the Priddis Defendants through the Harry Fox Agency (transaction number TRX 70462898 and TRX 70469125). Declaration of Richard L. Priddis at 5.

Also, the Priddis Defendants have a mechanical license through the Harry Fox Agency for the composition "When It's Over" (license numbers 1072246021 and 1072483613). Declaration of Richard L. Priddis at 5.

In addition, the Plaintiffs have included five songs as part of the subject works which are in the public domain, and the Priddis Defendants have designated these compositions as such. Declaration of Richard L. Priddis at 6 and Exhibit A to Declaration and Exhibit A to Complaint. Also, upon examining the subject works, the Priddis Defendants noticed two compositions, "Begin the Beguine (Version 2)" and "You're the Top (Version 2)." Declaration of Richard L. Priddis at 6 and Exhibit A to Complaint. As the Priddis Defendants are aware of only one version within their catalogue relating to each of these specific compositions, and are uncertain as to what the designation "Version 2" means, the Priddis Defendants have listed corresponding license numbers to "Begin the Beguine" and "You're the Top." Declaration of Richard L. Priddis at 6 and Exhibit A to Declaration.

Via a written agreement with the Mechanical Copyright Protection Society (hereinafter the "MCPS Agreement" and "MCPS," where applicable), the Priddis Defendants have obtained licenses for the following songs listed as part of the subject works: "Home"; "I Need You to Love Me"; "Light of the World"; "Only Grace"; "Photograph"; "Praise You in the Storm"; and "We Belong Together." Declaration of Richard L. Priddis at 7. The Priddis Defendants have attached as Collective Exhibit B to the Declaration of Richard L. Priddis true and correct copies of certain "cue sheets" relating to these songs, which represent formal notification of application for license. Declaration of Richard L. Priddis at 7 and Exhibit B to Declaration. Under the MCPS

Agreement, the Priddis Defendants are required to send MCPS such notifications concerning compositions they intend to use, and they are thereafter considered licensed, unless MCPS provides written notification to the contrary. Declaration of Richard L. Priddis at 7. The Priddis Defendants have regularly paid royalties under the scheme outlined within the MCPS Agreement. Declaration of Richard L. Priddis at 7.

The Plaintiffs admit the existence of the MCPS Agreement, but assert generally and without specific facts that the Priddis Defendants have acted "outside the scope" of licenses granted under the MCPS Agreement. Declaration or Richard L. Priddis at 8. The Priddis Defendants are perplexed by this assertion, as the Plaintiffs fail to identify any specific allegation relating to any operation outside the scope of the MCPS Agreement. Declaration of Richard L. Priddis at 8. The Priddis Defendants speculate, however, that the Plaintiffs imply that the licensing under the MCPS Agreement extends only to the United Kingdom. Declaration of Richard L. Priddis at 8. The MCPS Agreement, however, provides for world-wide rights, defining the agreement's "territory" in pertinent part as "the United Kingdom and any other countries in the world . . . ." Declaration of Richard L. Priddis at 8.

As for specific songs to which the Plaintiffs refer in their Motion, the Priddis Defendants have, contrary to their assertions, acquired licenses relating to these compositions. Declaration of Richard L. Priddis at 9. Specifically, concerning Exhibit A to the Declaration of Dorothy D. Gibby, the Priddis Defendants have acquired mechanical licenses through the Harry Fox Agency for the following songs: "The Prayer" - license number 1060483957; "Goodbye to You" - license numbers 1071855171, 1060465658, 1060492185 and 1071855169; "Follow Through" - license numbers

1071824986 and 1070591611; "Savin' Me" - license numbers 1072246517 and 1070591622; and "How You Remind Me" - license numbers 1071854403 and 1070591615. Declaration of Richard L. Priddis at 9. The web site pages attached as a part of Exhibit A to the Gibby Declaration relating to these compositions state in pertinent part as follows: "Printed and on-screen lyrics are not included." Declaration of Richard L. Priddis at 9 and Exhibit A to Gibby Declaration.

As for the Plaintiffs' assertions contained in the Gibby Declaration stating that "ProSound is still offering on ProSing's website two of the six songs on Plaintiffs' Exhibit A to the Complaint," such statement is incorrect, as the Plaintiffs have not identified "Love's the Only House" as one of the 345 subject works. Declaration of Richard L. Priddis at 10 and Exhibit A to Complaint and Exhibit B to Gibby Declaration. Also, the Priddis Defendants have acquired a mechanical license (number 1060593462) through the Harry Fox Agency and a reprint license (number 36008) through the Hal Leonard Corporation relating to the composition "True Love," referred to by the Plaintiffs in Exhibit B to the Gibby Declaration. Declaration of Richard L. Priddis at 10 and Exhibit B to Gibby Declaration.

Considering the mechanical and reprint licenses the Priddis Defendants have obtained relating to the subject works, the Priddis Defendants speculate that the Plaintiffs' assertions concerning licensing and authorization relate strictly to synchronization licenses[1], which the Plaintiffs assert the Priddis Defendants must obtain to use the subject

[1] "Synchronization" is the process of combining sound recordings with visual images. See Bridgeport Music, Inc. v. Still N The Water Pub., 327 F.3d 472, 481 (6th Cir. 2003) (citing Lindey on Entertainment, Publishing and The Arts § 7.01 (2d 2d. 2000)). A "synchronization license" is a license for use of a copyrighted musical composition in a film, pre-recorded radio or television program, or radio or television commercial. Id. Most often, synchronization licenses are necessary when copyrighted music is included in movies and commercials. Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 24.04[C][1].

works in conjunction with karaoke music products. See Declaration of Kelly L. Isenberg at 5.

C. The Karaoke Products At Issue In This Cause Do Not Require Synchronization Licenses.

Citing the Second Circuit's decision in ABKCO Music et al. v. Stellar Records, Inc., the United States Court of Appeals for the Sixth Circuit, in Zomba Enterprises, Inc. et al. v. Panorama Records, Inc., commented in a footnote that permission to fix copyrighted musical works with technology allowing visual presentation of the work's lyrics "generally comes in the form of a synch license." Zomba Enterprises, Inc. et al. v. Panorama Records, Inc., 2007 U.S. App. LEXIS 15180, *7 (6th Cir. 2007) (copy attached); ABKCO Music et al. v. Stellar Records, Inc., 96 F.3d 60, 62-63 (2nd Cir. 1996) (copy attached). The Sixth Circuit, however, has not issued a decision requiring synchronization licenses in conjunction with karaoke music products.

In a recent case of first impression, the United States District Court for the District of Utah, in an opinion criticizing the ABKCO Music decision, held that a synchronization license is not required when a copyrighted musical work is used in conjunction with a visual image consisting of nothing more than the work's lyrics on a screen. EMI Entertainment World, Inc. v. Priddis Music, Inc., 2007 U.S. Dist. LEXIS 37074, *14 (copy attached). Specifically, the EMI Court held in pertinent part as follows:

> Though EMI tries to minimize the difference between the visual display of song lyrics and motion pictures, television programs and other audiovisual works, this court is not persuaded that a copyright holder's synchronization right extends to the graphical display of written text, without more.

EMI Entertainment World, Inc. v. Priddis Music, Inc., 2007 U.S. Dist. LEXIS 37074, *14-15. The EMI court explained that if the appearance of a copyrighted song's lyrics on a screen constitutes an audiovisual work in the context of karaoke music, "then perhaps printed books should be treated as audiovisual works rather than literary works." EMI Entertainment World, Inc. v. Priddis Music, Inc., 2007 U.S. Dist. LEXIS 37074, *16. The copyright owners in EMI argued that the appearance of lyrics on a screen is no different than an ordinary film, but the court responded in pertinent part that "many things may appear to be quite similar if one simply ignores their obvious differences." EMI Entertainment World, Inc. v. Priddis Music, Inc., 2007 U.S. Dist. LEXIS 37074, *15.

As for specific products at issue in this litigation, the Priddis Defendants' karaoke products display the text of a song's lyrics (without any additional visual image content) on a video screen against a static blue background in timed relation to music recordings. Declaration of Richard L. Priddis at 11. In order to "cue" the karaoke performer, the displayed lyric text changes color from white to yellow as the music plays. Declaration of Richard L. Priddis at 11. Although the Priddis Defendants do not believe that the law requires synchronization licenses in relation to such karaoke products, the Priddis Defendants have, however, purchased various synchronization licenses for certain compositions among the subject works. Declaration of Richard L. Priddis at 11.

D. The Priddis Defendants Have Not Admitted Infringing Activity.

Concerning the Plaintiffs' assertions that the Priddis Defendants communicated to the Plaintiffs in response to a January 31, 2007 cease and desist letter that the Priddis Defendants had "ceased all infringing activities," the Priddis Defendants have never represented to the Plaintiffs that the Priddis Defendants' activities are infringing on the Plaintiffs' copyrights. Declaration of Richard L. Priddis at 12. The faxed correspondence upon which the Plaintiffs rely in making such assertions does not contain admissions of infringing activity but, rather, informs counsel for the Plaintiffs concerning business decisions the Priddis Defendants chose to make. Declaration of Richard L. Priddis at 12 and Exhibit C to Supplemental Declaration of Paul Harrison Stacey.

E. The Plaintiffs Fail to Satisfy the Elements Necessary for the Entry of a Preliminary Injunction.

According to the United States Court of Appeals for the Sixth Circuit, district courts assess the following four factors when determining whether to issue a preliminary injunction: 1) whether the plaintiff has a strong likelihood of succeeding on the merits; 2) whether the plaintiff will suffer irreparable injury absent the injunction; 3) whether issuing the injunction will cause substantial harm to others; and 4) whether the public interest will be furthered by the issuance of the injunction. Gonzales v. National Bd. of Medical Examiners, 225 F.3d 620, 625 (6th Cir. 2000); Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross and Blue Shield Ass'n, 110 F.3d 318, 322 (6th Cir. 1997). Significantly, a finding that there is no likelihood of success on the merits is usually fatal to a request for preliminary injunction, even though no single factor is controlling. Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1249 (6th Cir. 1997); Gonzales v. National Bd. of Medical Examiners, 225 F.3d at 625.

Contrary to the Plaintiffs' assertions that they have never authorized the Priddis Defendants to use the subject works, the Priddis Defendants have, in fact, purchased hundreds of licenses relating to the subject works. Declaration of Richard L. Priddis at 3 and Exhibit A attached thereto. Considering these licenses, and considering further the invalidity of the Plaintiffs' assertions concerning synchronization licenses, the Plaintiffs fail to establish a strong likelihood of success on the merits, a failure which the Priddis Defendants would assert is fatal to the Plaintiffs' Motion.

Moreover, in relation to karaoke products (and notwithstanding their ownership of certain synchronization licenses), the Priddis Defendants would suffer substantial harm if forced to purchase synchronization licenses not required by law, as such licenses would require fees in addition to the licensing fees the Priddis Defendants have already incurred. The harm to others could be substantial, as well, as the impact of such a decision on the karaoke music business and its related entities would be unduly oppressive. Certainly, issuing a preliminary injunction in this situation would not further the public interest, as such an injunction would allow and encourage "double-dipping" of licensing fees paid to valid copyright owners and would, therefore, limit the public's access to and enjoyment of musical compositions and would promote unfair competition.

III. CONCLUSION

Based on the foregoing, the Priddis Defendants respectfully request that the Court deny the Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

s/ Jeff T. Goodson
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by electronic means via the Court's ECF system upon the following:

1. Timothy L. Warnock, Bowen, Riley, Warnock & Jacobson, PLC, 1906 West End Avenue, Nashville, TN 37203;
2. Paul Harrison Stacey, Law Offices of Paul Harrison Stacey, P.C., 7225 N. Spring Gulch Road, P.O. Box 4157, Jackson, WY 83001;
3. James C. Bradshaw, III, Wyatt, Tarrant & Combs, 2525 West End Avenue, Suite 1500, Nashville, TN 37203-1423

and by United States Mail upon the following:

1. Frear Stephen Schmid, 177 Post Street, Suite 890, San Francisco, CA 94108; and
2. Owen Borum, Caplan and Earnest LLC, One Boulder Plaza, 1800 Broadway, Suite 200, Boulder, CO 80302-6737

on this the 17th day of July, 2007.

s/ Jeff T. Goodson
Jeff T. Goodson